

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MARI DANIEL, individually and as the
Personal Representative of the Estate of
MELVIN DANIEL; and, as Guardian for the
minor children, M.A. Daniel, DOB 6/13/90,
and B.A. Daniel, DOB 6/28/93; and, MARI
DANIEL, as the Personal Representative of
the Estate of FRED RAMISKEY,

Plaintiffs,

v.

THE COLEMAN COMPANY, INC., a
Delaware corporation,,

Defendant.

No. 06-5706 KLS

ORDER GRANTING, IN PART,
COLEMAN'S MOTION TO EXCLUDE
OUT-OF-TIME REBUTTAL REPORTS
AND NEW CASE THEORY

INTRODUCTION

This matter comes before the Court on the Defendant's Motion to Strike or Otherwise Exclude Plaintiff's Out-Of-Time Rebuttal Reports, and New Case Theory. Dkt. #95. At issue are a supplemental and rebuttal report by Robert E. Engberg dated November 25, 2007 (Dkt. #97, Exhibit A), a supplemental and rebuttal report by Gary Hutter dated November 24, 2007 (Dkt. #97, Exhibit A), a written report by Gary Hutter dated November 27, 2007 (Dkt. #97, Exh. B) and a letter by Tarald Kvalseth dated November 21, 2007 (Dkt. #97, Exhibit B).

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DEFENDANT’S REQUEST

The Defendant’s motion is two fold. First, the Defendant requests that all four reports be excluded because they were provided after November 3, 2007, the cut off date for production of expert rebuttal reports.¹ Second, the Defendant requests that the November 27, 2007 report by Gary Hutter be excluded as it asserts a new theory in the case - that being that the fuel flow was reduced not by “tank valve control” but rather by the “heater control knob.”

Up to, and including the date of November 24, 2007, the timely identified expert witnesses for the Plaintiffs based their conclusions on the “tank valve theory,” which assumes that the fuel flow to the heater was reduced by turning down the tank valve control. The experts spent a significant portion of their reports discounting the testimony of the sole survivor, Robert Haney, on the basis that his exposure to carbon monoxide made his recollection of his actions questionable. This, they reasoned, permitted them to discount Mr. Haney’s testimony and that assumption then supported their tank valve control theory.

On November 27, 2007 Gary Hutter performed additional tests utilizing the subject Coleman heater in the Daniel camper. As a result of those tests, he concluded that the heater control knob could be adjusted so as to restrict the flow of fuel which would then produce dangerous levels of carbon monoxide. This conclusion would then support Mr. Haney’s testimony but it also contradicts the theory advanced by Mr. Engberg and Mr. Hutter (at least until November 27, 2007), that Mr. Haney’s recollection of the events could not be trusted.

The Defendant’s view this as a new theory which was disclosed only one week before the close of discovery and more than three weeks after expert rebuttal reports were due.

PLAINTIFF’S RESPONSE

The Plaintiffs’ assert that they timely supplemented their experts reports as required by Fed. R. Civ. P. 26(e)(1). The Court assumes, however, that counsel intended to reference Fed. R. Civ. P. 26(e)(2) as that is specific to expert witnesses, which provides as follows:

For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party’s duty

¹The Court notes that the Plaintiff’s response focused on the November 27, 2007 report by Gary Hutter. The Plaintiffs do not address the November 25, 2007 supplemental and rebuttal report by Robert Engberg, the November 24, 2007 supplemental and rebuttal report by Gary Hutter or the November 21, 2007 letter by Tarald Kvalseth.

1 to supplement extends both to information included in the report and to information
2 given during the expert's deposition. Any additions or changes to this information
must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

3 The Plaintiffs' counsel asserts that in late October or early November, while preparing for trial,
4 counsel "noticed" that their "experts' opinions "appeared to be limited or incomplete based on the fact that
5 the opinions appeared to contradict the testimony of Robert Haney, who testified that the tank valve was
6 fully open and that the 'control knob' was the only adjustment made to reduce the flow of gas." (Dkt.
7 #106, p. 3) As a result, Plaintiffs' counsel immediately asked Plaintiffs' expert, Dr. Gary Hutter, Ph.D, to
8 re-evaluate the Haney testimony, and supplement, revise, or correct any opinions that may have been
9 incomplete." (Dkt. #103, p. 1). At the request of Plaintiffs' counsel, Mr. Hutter performed additional
10 tests on November 27 and, as a consequence of the information he obtained in the new testing, he prepared
11 a report of that same date which was provided the Defendant on November 28, 2007, the day prior to the
12 scheduled deposition of Gary Hutter.

13 Also included in Mr. Hutter's November 27, 2007 report is a summary of his operation of the
14 refrigerator/freezer, hot water heater, and furnace in the Daniel camper. No explanation is provided the
15 Court as to why this testing was done after the expert rebuttal cut-off date. It is clear that the Plaintiffs'
16 experts have had access to the trailer, that they relied on others who inspected these items and apparently
17 saw no reason to analyze them independently. No reason is given for delaying this inspection until six days
18 before the discovery cut-off.

19 The Plaintiffs' had control and unfettered access to the subject Coleman heater for over 10 months
20 before it provided the heater to the Defendant. The Defendant's had the subject heater from October 2,
21 2007 until November 16 or 19, 2007. Plaintiffs' infer that one reason the Hutter testing did not occur until
22 November 27th was due to the fact that the Defendant belatedly returned the heater to them. The evidence
23 before the Court shows that Plaintiffs' counsel first requested return of the heater on November 7, 2007
24 and made a second request on November 16th. The first request was made four days after expert rebuttal
25 reports were due. The Court notes, however that the Plaintiffs assert that the November 27th letter was a
26 supplement to Mr. Hutter's initial report and was not rebuttal.

27 DISCUSSION

28 The undersigned is well aware of the fact that Mr. Engberg and counsel for the Plaintiffs' decided,

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1 early on, that Mr. Haney's description of the events surrounding this incident could not be accurate. A
2 substantial portion of Mr. Engberg's initial report as well as his supplemental and rebuttal report of
3 November 25, 2007 focus on discounting Mr. Haney's recollection and in support of the "tank valve
4 control" theory of the case.

5 This Court has been provided with a copy of a Memorandum dated February 28, 2007, authored by
6 Michael Stageberg (MNS), that summarizes testing done in Seattle with regard to the Daniel case. Robert
7 Engberg, one of the Plaintiffs' experts was present. Mr. Hutter was not listed as being present. On that
8 date the attorneys and Mr. Engberg "unanimously" concluded that "Bob Haney's factual version could not
9 be correct." The Memorandum goes on to conclude that it is "likely that Haney would have turned the
10 tank valve to a lower setting to reduce the amount of heat within the camper." All the experts for the
11 Plaintiff proceeded under this assumption and the reports provided defense counsel, which met the
12 deadlines scheduled by this Court, were based on that assumption. At all times, the Plaintiffs knew that
13 this assumption clearly contradicted and discounted the testimony of Mr. Haney.

14 Mr. Haney gave a taped statement to Detective Bruce F. Kimsey of the Lewis County Sheriff's
15 Office on September 15, 2006, the same date as the incident. (Dkt. #199, Exh. C). In his statement he
16 told the Detective he ran the portable propane heater for about an hour the evening of September 14th and
17 then he turned it off. He woke up the morning of September 15th around 4:30 a.m. and "started the
18 portable propane heater and uh to knock the chill off in the morning." *Id.* It was after that he found that
19 both Melvin Daniel and Fred Ramiskey were deceased. He then turned the heater off.

20 Robert Haney was deposed on November 9, 2006, less than two months after the incident.
21 Counsel for the Plaintiffs in this case were present when this deposition was taken. Mr. Haney deposition
22 testimony regarding the amount of time the Coleman heater was used inside the Daniel camper was
23 consistent with the information he provided Detective Kimsey. He denied ever adjusting the tank valve to
24 reduce the flow of propane, and reiterated that he turned the heater off before he left the Daniel camper to
25 use the bathroom. In response to the question as to whether the temperature setting is adjustable, Mr.
26 Haney showed on the video how "you can turn it all the way down to almost off before it reaches the
27 detent. When it reaches the detent, it pops up and it shuts it off. But you just - I mean, anywhere in
28 between there depending on how big of an area you want to heat or how hot you want it." (Dkt. #199,

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1 Exh. A, p. 18 of transcript).

2 The Court understands the Plaintiffs' argument that the "tank valve theory" simply explains how a
3 reduced flow of propane was created that lead to the production of excessive amounts of carbon
4 monoxide. The Plaintiffs' now posit that the "heater control knob" is just simply another way in which the
5 flow of propane could be reduced. This, however, presents a significant change in position taken by the
6 Plaintiffs' experts well after the experts initial and rebuttal reports were due and only six days before
7 discovery cut-off.

8 Fed. R. Civ. P. 26(a)(2) (B) requires an expert's written report to include: a complete statement of
9 all opinions the witness will express and the basis and reasons for them; the data or other information
10 considered by the witness in forming his or her opinions; as well as any exhibits that will be used to
11 summarize or support the opinions. The CR 26 expert report is to be a complete and detailed report, not a
12 preliminary report.

13 Inherent in the Scheduling Order is the requirement that all experts who are required to provide a
14 written report will prepare their report which meets the requirements of Rule 26. This means that the
15 opinions are formed and the reasons therefor can be clearly stated. The deadline for report disclosure then
16 allows sufficient time for the parties to take discovery depositions and conduct other discovery, as it relates
17 to the expert's opinions, prior to the discovery cut-off date.

18 Further, the rule requires any supplementation of an expert's report to be related to "information
19 included in the report and to information given during the expert's deposition." Fed. R. Civ. P. 26(e)(2).

20 The opinions in Mr. Hutter's November 27, 2007 letter are different from, rather than supplemental
21 to, the information contained in his earlier reports. In fact, it is different from the report he authored on
22 November 24, 2007. This is not supplementing based on an attempt to correct inaccuracies or to fill "the
23 interstices of an incomplete report based on information that was not available at the time of the initial
24 disclosure." *Keener v. United States*, 181 F.R.D. 639, 640. The change proposed by Gary Hutter's latest
25 report is dramatic as it clearly contradicts all of the expert testimony previously provided which focused on
26 the effects of carbon monoxide poisoning on Robert Haney's recollection of events. This change is also
27 not based on new information that was not available to the Plaintiffs but rather is based on a very late
28 change of counsel's mind. The court can only conclude that the November 27, 2007 letter by Gary Hutter

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1 is not a supplement to his initial report as it does not correct an incomplete or inaccurate report but rather
2 sets forth a completely new explanation as to how the incident occurred which explanation, for the first
3 time, accepts Mr. Haney's recollection of the events as being accurate.

4 With regard to Mr. Hutter's review of the refrigerator/freezer, hot water heater, and furnace in the
5 Daniel trailer, that late testing is also excluded. This testing could clearly have been done in a timely
6 fashion and no reasonable explanation has been provided this court as to there was such a delay.

7 CONCLUSION

8 The undersigned concludes that the November 27, 2007 report by Gary Hutter should be excluded
9 as well as any testimony related thereto.

10 The Court is mindful that the public and the parties have an interest in expeditious resolution of
11 litigation. The Court, however, has a strong interest in managing its docket so as to facilitate the timely
12 and adequate preparation of cases. This is of particular concern as Plaintiffs' counsel never filed a timely
13 request to extend any of the relevant Scheduling Order deadlines. The Court's Order provides for only
14 partial exclusion of Mr. Hutter's opinions which are contained in the November 27, 2007 letter. He still
15 may offer opinions and testimony in conformity with his reports that were timely disclosed.

16 As noted above, however, the Defendant's motion was two fold and the Plaintiffs' responded only
17 to that part of the motion pertaining to Gary Hutter's latest letter. This matter is set for oral argument on
18 Thursday, March 20, 2008 so the Court will entertain oral argument with regard to the following three
19 reports: the November 25, 2007 supplemental and rebuttal report by Robert Engberg (Dkt. #97, Exhibit
20 A), the supplemental and rebuttal report by Gary Hutter dated November 24, 2007 (Dkt. #77, Exhibit A),
21 and the November 21, 2007 letter by Tarald Kvalseth (Dkt. #97, Exhibit B). As the parties are aware, the
22 undersigned has already excluded Eileen Kirkpatrick's reports and opinions. (Dkt. #152).

23 In summary, the Defendant's Motion to Strike or Otherwise Exclude Plaintiff's Out-of-Time
24 Rebuttal Reports, and new Case Theory is granted insofar as Gary Hutter's report of November 2007 is
25 excluded and Mr. Hutter is prohibited from offering new opinions which are based on information
26 contained in that report. The Court's ruling on the balance of the Defendant's motion is deferred until oral
27 argument.

28 DATED this 11th day of March, 2008.

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A handwritten signature in black ink, appearing to read "Karen L. Strombom", is positioned above the printed name.

Karen L. Strombom
United States Magistrate Judge